

No. 11,117

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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CLIFFORD J. JUDD,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

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OPENING BRIEF FOR APPELLANT

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FILED

FEB 20 1946

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United States  
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OPENING BRIEF FOR APPELLANT

---

The appellant was prosecuted by an Information filed by the United States Attorney for the Northern District of California which alleges as follows:

“Now comes Frank J. Hennessy, United States Attorney for the Northern District of California, and by leave of Court first had obtained, informs this Court; That Clifford J. Judd and Frank Edwin Sheley (hereinafter called ‘said defendants’), on or about the 19th day of April, 1945, at the City and County of San Francisco, State of California, within said Division and District, did knowingly, wilfully and unlawfully, by threats and by force, endeavor to influence, intimidate and impede one Lester Dale Haliman, the said Lester Dale Haliman

being a witness in the United States District Court for the District of Nevada in the case of the United States vs. Clifford J. Judd and William N. Beatty, a proceeding before the said District Court for the District of Nevada, as the said defendants then and there well knew.”

(TR. 2-3)

Having been found guilty upon the charge he was sentenced to imprisonment for a period of six months and to pay a fine in the sum of \$500. From the aforesaid judgment and sentence he appeals to this Honorable Court. (TR. 8)

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### JURISDICTIONAL STATEMENT

(Rule 24, Section 2, Subdivision B, Rules of the United States Circuit Court of Appeals for the Ninth Circuit.)

The statutory provisions believed to sustain the jurisdictions are as follows:

(1) *The jurisdiction of the District Court.* USCA Sections 41 and 371. The latter section provides that the Federal Courts shall have exclusive jurisdiction “of all crimes and offenses cognizable under the laws of the United States”. Also the Constitution of the United States, Amendment VI:

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed.”

(2) *The jurisdiction of this Court upon appeal to review the judgment in question.* Section 128 (a) of the Judicial Code:



“The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 238.”

(3) *The pleadings necessary to show the existence of jurisdiction.*

(a) The information. (TR. pages 1-4.)

(4) *The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question:*

The United States Attorney for the Northern District of California filed the foregoing information which we have set forth *in haec verba*.

In accordance with the rules of this Honorable Court we now set forth the ensuing:

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#### ABSTRACT OF THE CASE

We set forth the following proceedings had and testimony given upon the trial of the cause, omitting what we deem immaterial:

The government offered in evidence certain documents to-wit, certified copy of an indictment, in case No. 11171 in the District Court of the United States of America in and for the District of Nevada, United States of America, plaintiff, vs. William Nelson Beatty, Jr., and Clifford J. Judd; and a copy of the docket entries in that case.

Mr. McDonald: To which we object as incompetent, irrelevant and immaterial. The proper foundation has not been laid. It has not been shown that this defendant is the defendant mentioned in the papers that Mr. Colvin has in his hand. We have the further objection that these papers are not the best evidence, that there is no showing why the original records of the Court have not been brought here. We submit the objection on those grounds.

The Court: I will overrule the objection, and I will note an exception for you.

#### EXCEPTION NO. 1

Mr. Colvin: May it please the Court, I should like the Court's permission at this time to read government's Exhibit No. 1 to the jury, simply because their understanding of the indictment.

The Court: It is in evidence. You may read it if you wish.

Thereupon the said Indictment (Tr. p. 15) was read to the jury.

Lester Dale Haliman,

called as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

#### Direct Examination

I was before the grand jury at Carson City, Nevada, on April 16, 1945. I testified before the grand jury. I have heard the reading of an indictment which is government's Exhibit No. 1 in this courtroom. I testified to the facts set forth in that indictment. I came back to Reno after testifying and took the train that night

and returned to San Francisco the next day. I got in in the morning. I got in the morning of the 17th at approximately seven o'clock. I think it was the night of the 19th, the first night I worked, I didn't work this side. On the 19th of April 1945 I was employed at the Below Decks at 1285 Market Street. My employment there was a service bartender. I believe I went to work at about five o'clock or a little before. I know Clifford Judd. He is sitting directly behind you in the courtroom. I will point him out to the Court and ladies and gentlemen of the jury. (The witness identified the defendant Judd.) I know Frank Sheley. He is here in the courtroom. He is the gentleman over there with glasses. (The witness identified the defendant Sheley.) I saw both of them on the 19th of April 1945. I saw them at the Below Decks where I was employed. I would say that I saw them somewhere in the vicinity of eight or nine o'clock in the evening. I saw Judd first. The Below Decks is below the street level. If you are facing the building on the extreme left hand side is the entrance to the building. When you reach the bottom of the stairs there is a bar on the other side of the room. The bar would be across the room, and I imagine the room is twenty-five or thirty-five feet wide. Perhaps that, or more. I am not a very good judge of distance, perhaps more. I first saw Judd when he got to the bottom of the stairs. I do not know whether there was anyone with him. I did not see Sheley until a few minutes later. Judd reached the bottom of the stairs. He walked across the room toward me, smiled and said, "Helloe Dale," and I said "Helloe Cliff." I then came back to the bar,

and I noticed Sheley then. He was standing ten or fifteen feet away. That was the first time I saw Sheley. Judd said, "I heard you were exonerated," and I said, "Yes, that's right," and he said "Sheley was exonerated, too. He got a letter," and he said, "How did you know you were?," and I said, "I got a letter, too." He said, "What did the letter say?" and I said, "Well, just something to the effect that my bond had been liberated and I had been exonerated." He said, "Have you seen Bill?" and I said, "No," and he said, "Are you all through or will you be going back there to testify?" and he said, "If you are, you had better not", and he asked me again—. Perhaps I could show you the relative position of myself and Mr. Judd while this conversation took place. The service bar at the Below Decks, where I am employed, is at one end of the bar. I handle no service for the front bar patrons; just for our cocktail waitresses. I believe that night there were four working. It is hard to describe. Right directly in front of me like a space—so I took my station where the waitresses come for the drinks, and there is a rail coming down over the bar. This is on my left, and there are stools for the front bar. My mother was sitting in the corner by the rail with the stool closest to me. When Judd came up to the bar he came right beside her and when I was talking to him most of the time I was leaning over in that direction, and there is a cooler that projects on the inside of the bar that sticks out so far, (the witness indicating about three feet). I think that explains it pretty well. I gave you part of the conversation. The next thing that happened, he asked me to repeat how the letter was worded, and



I said, "I don't know exactly, just something to the effect that I had been exonerated and I had been liberated," and with that, he said, "You are a damn liar," and reached across the bar and struck me on the side of the head, and my mother was sitting there and said, "How dare you strike Dale?" He said, "Who the hell are you?" and she says, "I happen to be his mother." He said, "We want to see you outside" and left. I don't believe Sheley was within earshot during this conversation. He was (17) approximately ten feet away. The next thing that happened, Sheley came over and said that he and Judd had seen signed statements by Bill Beatty and I to the effect that Judd purchased liquor from Sheley, and I denied that. He asked me where I could find Beatty and if I could tell him where he was. I told him I did not know. He told me I did know, and was a liar. I said, "It doesn't make any difference whether I did or not, and if I did know I wouldn't tell you anyway," and he said, "Is that your answer?" And I said, "Yes." They said they were very anxious to find Beatty and he said he wouldn't blame Judd for killing anyone that testified because he would do the same thing himself. There was more conversation. I don't remember it word for word, except Sheley said he was pretty mad about the case, that it cost him a lot of money, and he told me Judd wanted to be my friend, and he said that he was half crazy, that he was upset, and that he was facing the penitentiary, and that he believed that he had been drinking. That was all the conversation. He talked to my mother as well. I couldn't hear that; just a word once in a while. I had no further conversation with Judd.

Judd had left. I was present at this conversation with my mother. This was a conversation between my mother and Sheley.

I had been arrested in connection with the case in Nevada. At that time I appeared before the grand jury I was under arrest in that case. I was not indicted. The earliest conversation I had with Mr. Judd regarding this case was April 3, 1945, in the Streets of Paris in San Francisco, where I was also employed. This took place, I think, about five o'clock in the evening. There was present besides myself and Judd, Miss Bonita Yaggie.

Mr. Colvin: Q. With reference to the case at Reno, Nevada, what conversation did you have with Mr. Judd?

Mr. Mc Donald: If your Honor please, I will object to this as incompetent, irrelevant and immaterial, and further that it (18) goes to a transaction not laid in the indictment, and I can see that it has no place in this case. This is a case of a threat made upon April 19.

The Court: I will overrule the objection.

Mr. Mc Donald: Exception.

The Court: You may have an exception.

#### EXCEPTION No. 2

Judd came into the bar and asked me if I had seen Bill Beatty, the defendant, and I told him I hadn't. He asked me when the case was coming up, if I knew, and I said I was about to be called before the grand jury on the 16th but I wasn't sure of the date, and he talked over the case quite a bit. He told me he wasn't going to ride the beef on the liquor and destroying the serial numbers. He said he would have to say we stopped

somewhere along the road and destroyed them ourselves. He admitted that he destroyed them. He told me that he was going to have our bonds raised and that the bondsman was a friend of his, and he didn't care if he raised his along with ours, that he had plenty of money. I understood that we would have to stay in jail unless we could raise money to meet our bonds. He also told me he was going to have me picked up for the El Cortez robbery in Reno. I told him that was silly because I could (19) prove where I was that night, and he said he didn't know about that, that I will be picked up, and that he had known that, and he told me if I testified against him I would be dragged into the case, too, and that is about the text of it. He got up and left. This conversation lasted about fifteen minutes at the most. I cannot think of anything I haven't told you. There was a conversation before this in reference to this case. I believe it was on the 27th of March. It took place in Nevada. I had two conversations with him. They were both on the same day, on the 27th of March. One took place in the Waldorf. It is a restaurant and bar in Reno. I think it was late in the afternoon at about approximately four o'clock. There were a number of people present, but I don't think anyone was within earshot. No one else was a party to the conversation.

Mr. Colvin: Q. What was the conversation as it related to the Nevada case?

Mr. Mc Donald: We object to that as incompetent, irrelevant and immaterial, as a transaction not laid within the issues of this indictment. It is remote and far afield, and incompetent, irrelevant, and immaterial.

The Court: I think the objection goes to the weight of that testimony. I don't know whether you are making now a fur-(20)ther objection to that testimony, or to the proposed testimony.

Mr. Mc Donald: I ask that be stricken, and I am objecting to this testimony.

The Court: I will deny your motion and you may have an exception. For the same purpose this conversation now about to be stated by the witness will be admitted, and an exception will be noted.

### EXCEPTION NO. 3

He asked me what Bill had told him, that is, the investigators in Elko, and he asked me what he had told him. My answers were more or less vague. He asked me where Bill was, and I told him as far as I knew he was in San Francisco. He asked me where in San Francisco, and I told him I didn't know. He told me he would like to get in touch with him and asked me why Bill didn't come to see him in Reno, and I said, "Because I thought Bill was afraid of him," and he said, "That's a fine idea for him to bear in mind." That is about all. I saw him again that evening, just before I left on the train. I saw him at the depot at approximately 10:30. I did not have an appointment with him. However, I was to see him later that evening. I called him from the depot. He came about five minutes after I called him because his bar is just across the street from where I called from. Just Judd and I engaged in the conversation.

Mr. Colvin: Q. What was that conversation, and I am offering it for the same purpose, your honor.



Mr. Mc Donald: I make the same objection.

The Court: Same ruling, and an exception may be noted. (21)

#### EXCEPTION NO. 4

He asked me more about Bill and the statements he made. I believe I did tell him at the time he had taken the serial numbers off the liquor. He asked me if I saw Bill to contact him. He told me he would like to find Bill and shut him up. He said he knew he could and he knew he could get him back in San Francisco, and he had friends in Alturas, that Bill lived there as well. There was something else, he told me he would buy his way out if he wanted, but Bill put the finger on him and he was going to dump the whole thing in his lap. He asked for it. I don't believe that he said anything else. The date and place of the next conversation was April 3rd, at the Streets of Paris. That was the conversation I have already testified to. I had no further conversations with the defendant before I testified before the grand jury. After I testified before the Grand Jury the first conversation I had with him was at the Below Decks. I have been convicted of a felony. It was robbery in San Francisco in 1937. I am not on parole now. I have been discharged since October 1942. I have not been convicted of any other felonies.

The Witness: (Continuing): Mr. Judd hit me on the left side of the head. He hit me with his right hand. There was nothing (22) in his hand when he hit me. I did not fall pursuant to the blow. I did not go backwards. He startled me when he hit me. That is all.

## Cross-Examination

By Mr. Mc Donald:

I just was startled; I was not frightened.

It is true that I have been convicted of a felony. I was convicted of a felony under the name of Lester Dale Haliman. I did not give my name to the District Attorney as "Haliman" for the purpose of concealing that fact. I have been convicted of one felony. I was not convicted of a felony in Stockton. I was arrested about the 18th day of March of this year in Elko, Nevada. I was arrested with a man by the name of William Beatty. I did not have certain liquor in my possession at that time. There was certain liquor in Mr. Beatty's automobile. I had driven from Reno to Elko with Mr. Beatty. I was arrested in Elko. I gave bond in that case. We posted bond before the United States Commissioner in Elko. I was represented by counsel there—Mr. Taylor Wines.

I believe that Mr. Judd was subsequently arrested. I was not present when he was arrested. Mr. Sheley was arrested also. They were arrested in the same case.

The man I refer to as "Bill" is Mr. William Nelson Beatty, Jr., who was arrested at the same time and place as I was. I do not know the date of the arrest. It was approximately the 18th. I had a hearing before the United States Commissioner. I am not really sure about whether it was a hearing. I believe the attorney waived a hearing. I was held to answer.

We were released on bail the following Sunday and I left that night and came to Reno. I left Reno the following (23) Tuesday night, I believe the night of the 27th. I was arrested Sunday, March the 18th, and released the following Sunday.

I met Mr. Judd and Mr. Sheley at the Below Decks Bar in this city on the 19th of April. It was approximately 8 or 9 o'clock in the evening. I first saw Mr. Judd at the service bar. It is directly across the room from the bottom of the stairs. You go downstairs and turn to the right to come in and the bar is straight across from you at the far side of the room. The service bar is at one end. If you are facing the bar, it would be the left end, not the extreme end, because there is a service bar too where they serve food. You come in the entrance and the stairs would be on that side on the corner and the bar is over there. The service bar is like this. There is another counter where they serve food and my station is right there and the rest of it is the main bar.

I did not see Mr. Judd when he came down the stairs but just afterwards. I had not told Mr. Judd that I was working at the Below Decks Bar. He came back and asked me if I had heard anything in the case in Reno. He said he heard "you were exonerated." I said, "Yes, so I am told," or something to that effect. He was standing next to my mother, about three feet from me, a little bit to my left. I had to lean across the bar to hear him. I don't know that he is quite deaf. I have not known Mr. Judd very long. I met him in Reno. I met him in company with Mr. Beatty. Mr. Beatty introduced me to him. I knew Mr. Beatty very well. That was a few days before our arrest in Elko. Mr. Beatty had been employed by him for some time. Mr. Beatty was a bartender. I have been a bartender. I don't know that Mr. Judd is deaf. I don't recall ever having difficulty in conversation with him. My voice is fairly well modulated, I

think. He said, "I heard you were exonerated." He then told me that Sheley had been exonerated too and that he (24) had gotten a letter. Mr. Sheley was also a defendant in this same case. Then he asked about Bill. I told him I had not heard from him. If I did, I wasn't going to tell him. I knew where he was. He then asked me what was in the letter I got and if I was all through, if I would be called back to testify. He called me a liar and struck me and told me I wasn't through and he wanted to see me outside. When he asked me if I would be called back, he told me I had better not, and I told him I didn't know. I have had no further conversation with him since except here in court. I had another conversation over the phone with him. I did not tell him the whole thing could be straightened out for \$500.00. I do not know of anyone in my family phoning him, or anyone close to me phoning him. I do not know whether any friends did so at my direction. I do not believe so.

### Redirect Examination

I was going to Salt Lake. My wife and I were making a visit to Salt Lake to visit her people. I had been in pretty close contact with Bill Beatty. He was working at Alturas. I would phone occasionally. I knew he was planning to be in Reno, so I wired him when he intended to be here. The plane was grounded on account of weather conditions and we took the train. We planned to continue by train or plane to Salt Lake City. When my wife got a reservation to Salt Lake, I was not able to get a berth, so I planned to take a later train. I knew that Bill was driving. Bill offered me a ride to Salt Lake City and I accepted.



## Recross-Examination

It is not a fact that Mr. Beatty and I intended to open a bar in Elko. I never told Mr. Beatty that. I did not tell Mr. Beatty anything about trying to purchase a gun in Reno. I did not have a gun when I was in Reno. I did not have a gun when I was arrested in Elko. Mr. Beatty, I believe, had two guns.

The conversation at the Streets of Paris was not about \$45. I did not tell Mr. Judd that I purchased this gun that Mr. Beatty was found with in Elko, one of these guns, and that it was my gun but that I wanted Beatty to take the fall for it and admit the possession of it because my being an ex-convict, the possession of a gun in the State of Nevada would be a felony. I do not recall discussing with Mr. Judd the fact that two guns were found in the room occupied by Mr. Beatty and myself at Elko. There were two guns found at that time and place. I do not recall having discussed with Mr. Judd the fact that I had been convicted of a felony.

Mr. Judd came to the place on April 3rd. I was working at the service bar and I was working the whole front bar at the time he came in. The bartender was out eating. It was an off-hour. Mr. Judd was alone. I had a conversation with him. Mrs. Yaggie, the cashier, was present; she was about five or six feet away from us. I knew she could overhear what was said. We discussed it after Mr. Judd left. He asked about the Grand Jury meeting. He asked me when it would come up and I said the 16th; I think he asked me if I would be there and we discussed the business of the serial numbers and Bill's whereabouts and this El Cortez business.

Bonita Yaggie,

called as a witness for the Government, testified in substance as follows:

Direct Examination

My name is Mrs. Bonita Yaggie. On April 3, 1945, I was employed at the Streets of Paris. I was working on that date. I know the defendant Clifford Judd when I see him. He is sitting right over there. (The witness identifies the defendant Judd.) I saw him on April 3rd. I saw him at the Streets of Paris. My position there was cashier behind the bar. Mr. Haliman was working there. He was present when I saw Mr. Judd. They had a conversation. I was present during that conversation. Mr. Judd asked where Bill was; Mr. Haliman said he did not know. Judd insisted that he should know and Mr. Haliman had better tell him. Mr. Haliman said he did not know and would not tell him if he did know. He said if Mr. Haliman did not tell him where Bill was, he would have the bond raised. He said he would have him picked up on the El Cortez robbery. Haliman said he would not have him picked up on the El Cortez robbery because he had not been there and he could prove that he was elsewhere. Judd said Dale had removed the serial numbers from the cases, and Dale said he hadn't anything to do with that and he hadn't any reason for doing so. Judd said he was still going to do it and admitted he did it himself. He said that he was going to say that Dale and Bill must have pulled up by the side of the road (29) some place and removed the serial numbers, and Dale said, "You did it yourself. We had no reason to." Judd

said, "Yes, I know, but I am not going to take the rap on it." Judd said that if Haliman testified against him, he would draw him into it, too. That he would draw him into the case. That is all that I can remember.

I did not hear any conversation about the Grand Jury in Reno. There might have been something, did I did not hear it. All I heard was about finding Bill and where he was. No, there was no further conversation after he made the remark about the serial numbers and if Haliman testified against him, he would draw him into the case. He got up and left.

I saw him after April 3rd. He was down at the Streets of Paris but he did not come to the bar where I was working. Haliman was not working there at that time. Judd was standing at the end of the bar and glanced down and I saw him but when I looked down again, he was gone. That was late in the evening. The next time I saw Mr. Judd was in court today. I did not see the defendant Sheley at any time.

Mr. Mc Donald: If your Honor please, I ask that this conversation be stricken from the record, and that all of the testimony of this witness be stricken from the record as incompetent, irrelevant and immaterial. It has nothing to do with the date of April 3 (April 19) and there is no evidence that there was any threat or intimidation of this man as a witness. I can see no purpose in this conversation from the evidence in this case, and I ask it be stricken.

The Court: The motion will be denied. You may have an exception.

## EXCEPTION NO. 5

## Cross-Examination

It is not unusual for people to come into the Streets of Paris. It opens at 4 and closes at 2. People come in there during those hours. It is not unusual that Mr. Judd would come into the Streets of Paris. I know Mr. Haliman as Haliman, not Halima. He had a conversation with Mr. Judd looking for Mr. Beatty. He had not told me he was under indictment in Nevada. He had not told me that there was a complaint filed against him. I did not know why Mr. Judd was looking for Mr. Beatty. I knew nothing about the trouble Mr. Haliman was in. I paid attention to the conversation. There were three people at the bar—Mr. Haliman, myself and Mr. Judd and it was quiet and naturally I was going to listen, with nothing else to do. I had nothing else to do. It was between 5 and 5:30.

I have known Mr. Haliman for four or five months, maybe longer. He was an employee of the Streets of Paris. I was employed by the Streets of Paris. I met him in connection with my employment. I never saw Mr. Judd before. I would say that he was talking in a normal tone of voice. I do not know whether Mr. Judd has ever seen me before or not. I have never seen him. They did not say what Mr. Haliman was going to testify to. There was some discussion about serial numbers.

This discussion took place on the evening of April 3rd at the Streets of Paris. I worked at the Streets of Paris over a year. I have known Mr. Haliman for four or five months. I am not at the Streets of Paris now. I left there about a month ago. I do not remember for sure when Mr. Haliman left there. I left there before he left.



Marie V. Cole,

called as a witness on behalf of the Government, testified in substance as follows:

I am Mr. Haliman's mother. On April 19th of this year, I was at the Below Decks. That is the place where my son is employed. On that evening, I saw both of the defendants. It was (32) sometime around nine o'clock, probably a little after. I was sitting on a stool in front of the service bar, talking to my son, when I first saw them. I first saw Clifford Judd (pointing to the defendant Judd). He came up and stood right beside me, his arm touching mine on the right. I did not see Mr. Sheley at this time. I first saw Mr. Sheley after Cliff Judd left.

There was a conversation between my son and Mr. Judd in my presence. It occurred shortly after I first saw Mr. Judd. There was no one else present besides Mr. Judd, Dale Haliman and myself. The conversation related to this case in Reno, Nevada. Mr. Judd came up to the bar and stood on my right side and said to my son, "I hear you are exonerated." My son said, "Yes, so I am." He then said, this Mr. Sheley, that he had been exonerated also. He asked my son how he knew he was exonerated, and my son said, "Well, I have a letter, too." He questioned him as to what was in the letter and my son mentioned the fact that he had been exonerated and his bond liberated. He asked him if he had seen Bill and my son said no. I don't remember just what he said then. There was so much conversation. He referred to the letter again and asked him what was in the letter. My son told him what it was. I don't know—I don't remember the words. There was a little talk back and

forth. He then said to my son, "You are a God damn liar," and he jumped up and threw his body against the bar rail and smashed my son on the head with his fist. I grabbed him and pulled him back. I said, "How dare you come in and strike my son?" He said, "Who the hell are you?" I said, "I happen to be Dale's mother." He said, "I don't give a damn if you are." He did not hit me. He doubled up his fist. Judd then left the bar.

Clifford J. Judd,

called in his own behalf, testified in substance as follows:

My name is Clifford J. Judd. I live in Reno at 529 Mill Street. I am manager of the Depot Bar. I have been so engaged since last August. I also have been in the Merchant Marine. I know the witness that testified here this morning. Lester Dale Haliman, or Lester Dale Halima. I knew him under the name of Haliman. I met him in Reno through a boy who was working for us or had been working for us. I don't recall if he was working on that particular day or not. The boy's name is Bill Beatty. This Bill Beatty is William Nelson Beatty, Jr., that has been referred to in the indictment that has been introduced as evidence in this case. Mr. Beatty introduced me to Mr. Haliman. His purpose in introducing me was that they had been friends for quite a while and they were going to try and buy a business in Reno if they could get one. That was when I first met him. They were interested in the saloon business. They wanted me to go out to a place called "The Cedars" to look at it. They said they could get it for a small down payment. It is out on South Virginia Street on the road to Carson

City. I did not go out to look at it. Later he mentioned purchasing a place at Elko, Nevada. (38) He told me he was going to purchase a bar in Elko. He said that they had bought the bar there but they were short of merchandise. By merchandise, I mean whiskey; that is all they handle. Mr. Beatty wanted to borrow some whiskey from me with the understanding that if he couldn't return whiskey of this certain type, he would pay me for the whiskey. I loaned him certain whiskey.

I met Mr. Haliman a few days before. He was with Bill at the time when they helped carry the whiskey out of the basement of my place. There was a discussion about security for this whiskey. He said he had not been working for quite a while but that Bill had \$4500 and it would take all the money they had to pay down on the place, but he took off a square wrist watch that had a large diamond on each corner and said that if I wanted to hold it as security, I could. I told him that Bill's word was good enough; that he had worked for us for several months at both places. When I say "both places", I mean another bar that we own in Alturas.

Afterwards, Mr. Haliman and Mr. Beatty were arrested in Elko, Nevada. I was also arrested. I was charged with certain violations of the Internal Revenue law and conspiracy. I don't recall the date I was arrested. I recall the incident. I was arrested shortly after they were—within a couple of days. I recall meeting Mr. Haliman after he was released from jail in Elko. I met him at the Waldorf Cafe in Reno. I had a conversation with him at that time. He asked me if I thought it would be very serious and I told him at that time I had found

out I had been arrested and my attorney told me as far as I was concerned it didn't mean a great deal. That was our way of transacting business. We did it prior to that and each and every time since. It is routine business in Nevada. Loaning or selling whiskey to other bars. I did not tell him how to testify. (39)

He spoke about some pistols that they found tied up in the window curtains. These pistols were found shortly after their arrest. According to Haliman, they were found in the room occupied by himself and Beatty at Elko. He said that he had done some time in San Quentin and that if you have done a penitentiary sentence in another state, they would call it a felony against him, and that Beatty was willing to say that he bought, that he owned, both pistols. Beatty was willing to testify he bought both pistols, in order to save Haliman who had been previously convicted of a felony, from being arrested for a felony in the State of Nevada. He asked me to testify to the fact that Beatty had two pistols. I told him Beatty went and tried to buy a pistol from a man that was working in the Bonanza Club, but I didn't know where the second pistol was. He had asked me if he could buy a pistol from me and I told him I didn't have a pistol in the establishment and wouldn't be interested in one. We don't have them.

He said that he would call me again that evening if Bill came in. I was anxious to see Bill and if he came in, he would let me know. He would call me just before the train departed. It is just across the street from my place of business. He called me there. I went across the street to see him. We had a conversation at that



time. There was nothing said about his testimony in the case in Nevada. It reverted back to the pistol that he had purchased from a man in San Francisco, who he said was a friend of his and he could go back and have the bill of sale at the time when they found the pistol made out to him. He said if he went back to this man he would have him say that the pistol was sold to Beatty and that the bill of sale was made out in Dale's name and that the reason was that Beatty only (40) had \$100 and that the cost of the pistol was \$45, and the man made it out to Dale, but Dale just paid for it.

He told me that if I wanted to reach him, that I could reach him at the Streets of Paris. If there was anything he could do to get me out of trouble he would, but they haven't worried me then or since, other than the routine business which might happen. He then got on the train and went to San Francisco.

I came to San Francisco afterwards. My purpose in coming to San Francisco was to purchase or buy an interest in the Vanderbilt Bar that is located on Mason Street. I was making arrangements for the purchase of the bar. I saw Mr. Haliman a few days after he left Reno. I don't remember the date. I saw him at the Streets of Paris. I went to the bar about 5:30 in the evening. He was tending bar. There was a girl there. It was the young lady who testified here this morning. She was sitting down in front of the cash register. I bought a drink. I bought one for Mr. Haliman and I think I asked her to have one. The three of us had a drink. He took the money and handed it to her, the cashier, who charges you for the drink, and the bartender gives you back the change. I commented on this.

There was nothing said about the case in Nevada. We had a discussion and he called me away from the cashier to the other end of the bar, down a few feet, where the cashier couldn't be listening I imagine. There was nothing said about the serial numbers of any liquor. I don't recall whether I asked him about testifying against me, I didn't know he was going to testify against me. I thought we were all charged with the same offense, all four of us—I thought that we were all defendants in the same case. I don't recall any discussion with him about (41) the case. We were very friendly at the time. I never heard serial numbers mentioned until now. It was never discussed at all. Nothing more was said. I didn't think that the case was very serious.

I saw him on an occasion after I saw him at the Streets of Paris. I saw him up on Market Street. I don't know the name of the place. I know the location. It is across from and down a ways from the Fox Theater. I don't know the address. It has a bar down in the basement. I went in the bar on that occasion. I didn't know Mr. Haliman was tending bar there at that time. When I went down there, I ran right into him. He was tending bar at that time. There were people lined up on all sides of it. I don't know whether it was the service bar. I just walked up and started talking. I said, "Hello" and he said "Hello" and something else. I didn't hear what he said. He leaned over the bar to ask me a question and I leaned over the bar to meet him, and I laid my weight on my left arm and there was music and I couldn't hear what he was saying. I didn't hear what he was saying. I leaned over the bar. He put up his left hand, just went up easily, and

I put my right hand up and backed away. I don't remember if either one touched. I didn't strike him. I had no intention of striking him. When I put my arm up, I did it as an act. I didn't think and I didn't know that he had anything to be angry about. He kept on talking louder, but I couldn't hear what his words were, so I turned around and walked to the top of the stairs.

When I started down to the place, Mr. Sheley was with me. He came to the top of the stairs and there was a soldier or Navy boy from Reno. It was a soldier and he stopped and had a conversation with him and I just walked down.

On that occasion, I did not ask Mr. Haliman where Beatty was. I just got to say "hello" to him. I just said "hello" and (42) this trouble over the bar ended it. I didn't ask him if he was exonerated. I didn't know it at that time. I didn't tell him Frank Sheley had been exonerated. I didn't know it. Frank Sheley had been charged the same as I. He was charged the same as I and as Haliman and Beatty. I didn't know that any of us had been exonerated. I didn't know whether or not the Grand Jury had met. I didn't know whether or not Mr. Haliman had testified before the Grand Jury. I thought we were all charged equally. I didn't know he had testified against me in Nevada. I had not been back to Nevada since I met him in the Streets of Paris. My attorney told me he would notify me when it was to come up. My attorney had not notified me at the time of this discussion. After I put my hand up, there was no further discussion between Mr. Haliman and myself. There was no conversation between us. I heard him say "hello", that was all. I did not hear the rest of the conversation.

## Cross-Examination

I do not remember the first date I was in San Francisco this year. I have been down a number of times. I remember seeing Mr. Haliman about March 27th. I do not recall the exact date. The conversation took place at the depot in Reno. I came to San Francisco within a week after that conversation. I remember a conversation with Mr. Haliman at which Mrs. Yaggie was present. I don't recall how long I had been in San Francisco (43) before that. I think I came down the week following that that he left and I went in to the Streets of Paris shortly after I came down. I do not recall the exact date. I don't remember whether or not I went in the day I came to San Francisco. I was buying a place here and there was quite a bit of money being invested and I made numerous trips. I don't recall the exact dates that I was here.

I remember the conversation at which Mrs. Yaggie was present and I remember a conversation at the Below Decks. I do not recall whether I went back to Reno between these conversations. I went to the Streets of Paris shortly after I arrived. I don't remember the exact dates. It could have been four or five hours after I came to San Francisco. I may have asked him where Beatty was. I don't remember definitely asking him that question but I know that I should have asked that. A doctor had been calling our place repeatedly that his wife was dying. I do not recall if I asked that particular question at that meeting. I am not sure whether I asked that question at that meeting. The doctor had called a number of times saying that Beatty's wife was dying.



I went to the Streets of Paris early in the evening. I would not know the hour other than they just opened up. I would not know the exact hour—I didn't pay a great deal of attention. I don't know anything about the indictment. I knew we had already been charged. I knew we had been arrested. We had appeared before the Commissioner and posted bond. I don't believe it was a hearing—it lasted just a minute. I don't know what that would be. I knew there was a case in Reno. I knew Beatty also had been arrested. I knew that Sheley also was arrested and I knew that Haliman had been arrested. I knew it all had to do with the same transaction.

When I went to the Streets of Paris, Haliman asked me (44) how serious I thought the case was going to be. I told him I did not think it would amount to a great deal. I don't recall what his answer was. We talked about the case to the amount that I just stated. I didn't ask him if he was going back to Reno; whether or not he would testify was never mentioned. I don't know whether Sheley was in Nevada or California at that particular time. I don't recall definitely asking where Beatty was on that particular trip.

I don't remember the time or place that I met Mr. Sheley. A doctor phoned our place of business about Beatty's wife. Our place of business was the Depot Bar, Reno, Nevada. I didn't know William Nelson Beatty, Jr. had entered a plea in the Reno case. I have never heard of a plea of *nolo contendere*. I didn't know he had been arraigned before the Court any differently than we had. I was not particularly looking for Mr. Beatty. If I had met him, I would have repeated the conversation that the

doctor gave us. I don't recall asking for him at the Streets of Paris. I knew that Haliman and Beatty were good friends. I saw Haliman at the Streets of Paris and I knew the doctor was trying to reach Beatty. I don't recall whether I mentioned it to Haliman or not. It was a later time and it didn't seem so important to me. I had no way of knowing where he was and they said his wife was getting along fine. My wife is very friendly with them. I didn't say I asked for Beatty at the Streets of Paris.

The first thing that I did at the Below Decks was to walk up to the bar. I had never been there before. It was the first time I had been there. I went over to the bar, I saw Haliman. I walked directly to where Haliman was standing. This was the first time I had seen him since I saw him at the Streets of Paris. Sheley remained at the top of the stairs, as I went down. The first thing I said was "Hello" to him. I was standing right against the bar when I said it. I started the conversation by saying "Hello". He said "Hello" back. I have never heard what else he said. I never understood anything further in the entire conversation after he said "Hello"; that was all. I did not stay at the bar very long; just long enough to say "Hello", lean over the bar, turn around and go out. It would be a matter of seconds. I wouldn't recall the amount.

My head was down. I was leaning towards him. His head was almost touching mine. I was directly across the bar from him. My left arm was across the bar. My head was forward. The music was playing and I couldn't hear what he was saying. I wanted to hear what he was saying. He kept his conversation going, his arm right in

my face like that. It would have been his left arm. I was leaning over like this, my right arm back like this and walked out. I leaned over like this and put my right arm up like this. I brought my right arm forward in such (47) a manner that my wrist crossed my face. Then I walked out. I had no further conversation—not another word.

I did not see Mrs. Cole there. I saw her here this morning but it is dark in the place. I don't remember seeing her. I don't remember seeing her at any time. I walked out of the bar.

Sheley had left the top of the stairs and come down. I did not see him leave the top of the stairs, but as I walked up to the bar and turned around, he came in and went behind me on my left and was standing a few feet in front of the bar. I first saw him just as I left. He walked out in front of the bar and had a talk with Dale and I thought he would follow me out. He was a little to my left. I walked past him. I saw him as I walked out of the bar. I did not stop and talk to him. I walked straight up the stairs. I next saw Sheley outside the place.

Nobody told me that Haliman was working at the Below Decks bar. I didn't know he was working there. The last time I saw him he was at the Streets of Paris. It is a coincidence that I met him at the Below Decks.

I didn't put up the money for the bond at Reno. I know the bondsman. I have Beatty's address—the phone. His wife talks to me over the telephone.

I didn't know that the Grand Jury had met in Nevada. Mr. Robinson, my attorney, was going to advise me of that and he had not called me. I had no occasion to

threaten Mr. Haliman. I didn't speak to him except to say, "Hello". On the occasion at the Streets of Paris on April 3d, he seemed very friendly; both of us were very friendly. I had no hard feelings towards him at that time and there were no threats. On the night I saw him at the Waldorf and the Southern Pacific depot in Reno, there were no threats made against him.

Frank Edwin Sheley,

one of the defendants called as a witness, testified in substance as follows:

I reside in Reno, Nevada, at No. 244 East Taylor Street. I have been in trouble in the State of Nevada. I was convicted in the State Court there for receiving (51) stolen property and the case is now on appeal to the Supreme Court of the State of Nevada.

I know the complaining witness in this case, Lester Dale Haliman. I first met him in Reno. I never had any business with him. I saw him on the night of April 19, 1945, at the Below Decks. That evening I had been to the theater. I had met Mr. Judd at about 8:30 or 9 o'clock at the Vanderbilt Bar. He came in and we went to the Fox Theater. I met him at the Vanderbilt Bar and we decided to go to the Fox Theater. There was quite a line so we didn't go in. We went across the street to get a taxicab. I suggested getting a drink; about that time a soldier came along and said he knew me from Reno. We talked a few minutes and then I went downstairs. I suggested getting a drink. I know the name of the bar. It was a bar and I felt thirsty and went in. Mr. Judd preceded me downstairs. I stopped and talked to a soldier that I had



known in Reno. I subsequently went into the bar. I saw Mr. Haliman there. I asked him why he had me arrested and he said he had not had me arrested. I said that that is strange that I am charged with conspiracy for he and a fellow named Beatty having some whiskey, and I told him I had not sold him any whiskey and wondered why he had had me arrested and he said he hadn't. I asked him where Beatty was and he told me he didn't know, to see his attorney. He said as far as me being arrested, I would be exonerated. I asked him how he knew that and he said that he had heard today that he and I were both exonerated. That is the first I knew about it. The Commission in Reno when I was arrested told me that Haliman and Beatty had testified that they bought whiskey from Cliff Judd and I. They didn't buy any whiskey from me. I had none to sell. I never threatened him in any manner. I didn't tell him that Mr. Judd would kill him if he testified against him. I didn't tell him that I would (52) kill him if he testified against me because he had just told me that I had been exonerated.

I had no conversation with the lady who testified here today. I never saw her until today. I don't know her. I didn't see her in that place. There were quite a few people there. She didn't talk to me. I left, met Mr. Judd upstairs and we got into a cab and went back to the hotel. I did not speak to the mother of Mr. Haliman at the Below Decks bar. I didn't ask her where Bill Beatty was. I didn't know where he was at that time. I didn't care where he was at that time.

## Cross-Examination

The Commissioner did not tell me that Beatty and Judd were going to testify when the case came up. He told me that Beatty and Haliman had been arrested in Elko with some whiskey in their possession and claimed that they bought it from Cliff Judd and I. That was the charge.

I asked Haliman where Beatty was and he told me to see his attorney. That is all he said. I have asked Judd where Beatty was. I don't remember when it was—before I went to the Below Decks. He said he didn't know where he was. I didn't go to the Below Decks to find out where Beatty was. I went down to get a drink. I had no idea Haliman was working there. It was a complete surprise when I saw him there. I didn't see Mrs. Cole there. No, I didn't see her; there were quite a few people there. I didn't pay any attention to whether or not there were any women at the bar. I saw him and started talking with him. I wasn't looking for any woman.

I saw Judd leave before I started to talk to Haliman. I didn't say a word to him when he went out. I walked over. I don't remember whether I spoke or not, and asked him why he had me arrested when I saw it was him there. He said he didn't. (53) I was referring to the case in Reno. He said he didn't have me arrested. I said that when I was arrested, I was informed by the Commissioner that he and Beatty had been caught with some whiskey and they claimed that they bought it from me. I was wondering why I was arrested. I don't recall the rest of the conversation.

I didn't say that I wouldn't blame Cliff for killing anybody that would testify against him. I don't know how

long I was there; it was a very short while. I saw he was there and he told me he didn't have me arrested, and Judd had left, so I left. I didn't even have a drink there. I didn't see Judd talking to him. I was at the top of the stairs talking to a soldier when Judd went down. I didn't see him walk down. I went over to the bar to talk to Haliman without stopping. I didn't tell him that there would be plenty more fights before this case came to trial. I didn't tell him this was only the beginning. I had no conversation with any woman at the bar. If Mrs. Cole was there, I didn't see her. I was not interested. We never went back to the Below Decks after that time. I never had any conversation with Haliman after that time. I never saw him. I never found out where Beatty was. I did not make any more inquiries. I was not interested. I had been exonerated (Tr. of Record, pp. 13-69).

At the conclusion of the testimony, the cause was argued by counsel and the Court delivered its charge to the jury, which thereafter returned a verdict finding the defendant Sheley not guilty and finding appellant guilty. Sentence, as heretofore noted, was thereupon passed upon appellant of imprisonment for six months and to pay a fine in the sum of \$500 (Tr. p. 8).

**SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON:**

Assignment No. I (Tr. p. 10)

Assignment No. II (Tr. p. 11)

Assignment No. III (Tr. p. 11)

Assignment No. IV (Tr. p. 11)

Assignment No. V (Tr. p. 11)

Not included in the assignments of error, but made one of the grounds of appeal (Tr. p. 9), and which we therefore submit is properly before the Court, is the contention that the District Court erred in not granting the motion of the defendant for arrest of judgment. This assignment places squarely before the Court the legal sufficiency of the information to charge any crime or offense against the United States.

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**ARGUMENT**

**THE CONVICTION OF APPELLANT IS A NULLITY, BECAUSE THE INFORMATION DOES NOT STATE SUFFICIENT FACTS TO CHARGE APPELLANT WITH ANY CRIME AGAINST THE UNITED STATES** (Grounds of Appeal No. IV).

As heretofore stated, the information in the case at bar is based upon Section 135 of the Criminal Code (U.S.C.A. Title 18, section 241) which reads as follows:

“Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any Court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as



such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than \$1000 or imprisoned not more than one year, or both."

In discussing the sufficiency of this information, we refrain from considering the decisions which deal with the power of the courts to punish interference with their witnesses, officers or process, as a contempt. The section is a penal statute and must be strictly construed. An information based upon it is subject to the rule of pleading which prevails in all prosecutions for crime, to-wit: That the indictment must be sufficiently specific and certain to inform the defendant of the nature and cause of the accusation against him to the end that he may prepare his defense, and plead a conviction or an acquittal as a bar to a subsequent prosecution for the same offense.

*United States v. Bopp*, 230 Fed. 731;

*United States v. Cruikshank*, 92 U.S. 542.

Furthermore, the rule is equally well settled that a defective indictment cannot be aided by any inference or surmise, because all intendments are against the pleader, and no inference or surmise can take the place of a necessary allegation in the indictment.

*Pettibone v. United States*, 148 U.S. 197; 37 L. Ed. 419;

*United States v. Louisville, etc. Co.*, 165 Fed. 936.

Tested by this well settled principle, the information in the case at bar is fatally defective for the following reasons *inter alia*:

There is no allegation in the information to show that the United States District Court for the District of Nevada had jurisdiction of the case of *United States v. Judd and Beatty* mentioned in the information. If the Court lacked jurisdiction, no crime could be committed under this statute. To state the matter otherwise, if the case mentioned in the information were one over which the Federal Court in Nevada had no jurisdiction, a witness would be under no obligation to obey a subpoena to appear upon the trial of the case; would not be in contempt of court for violating a subpoena; and a third party would be guilty neither of contempt of court nor of a violation of the statute for either inducing or intimidating a witness to prevent his attendance.

That this is the law is settled beyond all cavil by the federal decisions, including two on this circuit.

U.S.C.A., Title 18, section 241, is founded upon Section 5404 of the Revised Statutes. In *U. S. v. Armstrong*, 59 Fed. 568, a prosecution under that section, Judge Ross, for many years a judge of this court, clearly demonstrates that an indictment as indefinite and uncertain as that in the case at bar is wholly insufficient to support a conviction. He quotes the following language from *United States v. Carll*, 105 U.S. 612:

“In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words, by themselves, fully, directly, and expressly, without any uncertainty or ambiguity set forth all the elements necessary to constitute the offense intended to be punished.”

After quoting the language of the statute and the indictment under consideration, he adds:

“It is essential to the sufficiency of an indictment that the acts charged be, if proven, sufficient to support a conviction of the offense charged.”

In that behalf he cites *United States v. Cruikshank*, 92 U.S. 542, in which it is stated that the object of an indictment is:

“First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.”

In *United States v. Collins*, 79 Fed. 65, also decided on this circuit, the defendant was charged with violation of Section 5399 of the Revised Statutes, prohibiting the impeding of the due course of justice, which is one of the parent statutes of Section 241 of Title 18, U.S.C.A. The indictment alleged that a certain United States commissioner had issued a warrant upon which one Terry had been arrested, and a date fixed for conducting his examination; that the defendant was served with a subpoena which he corruptly refused to obey, and that he also corruptly refused to comply with an order of the Commissioner to deliver a certain letter in his possession to the United States Marshal. Judge Wellborn, in a very learned opinion, shows that the Commissioner had no jurisdiction to issue the original warrant for arrest, the affidavit being solely on information and belief, and had, therefore, no jurisdiction whatsoever over the proceeding. Accordingly,

the Court held that he lacked jurisdiction to issue the subpoena, and a demurrer to the indictment was sustained.

The information on file in this cause is utterly lacking in the necessary averments showing jurisdiction of the District Court for the District of Nevada, in the case of *United States v. Judd*, the cause in which it is alleged that Haliman was a witness. Nothing can be ascertained from the information as to the nature of the cause. The jurisdiction of the United States district courts is prescribed by the Constitution of the United States and by the statutes. Section 2 of Article III of the Constitution of the United States provides:

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States, —between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”

The statutory provisions relating to the jurisdiction of district courts are set forth in U.S.C.A., Title 28, section 27. This section sets forth 28 classes of cases in which original jurisdiction is vested in the district courts. Among these, for example, are suits between citizens of different states, “of all crimes and offenses cognizable under the au-



thority of the United States'', and all cases for the enforcement of any order of the Interstate Commerce Commission. There is no statement in the information that the case of *United States v. Judd* was a case falling within any provision of the statute. For aught that appears, it may have been a case exclusively within the jurisdiction of the State court, or a case over which *no court* had any jurisdiction.

The courts of the United States are of limited jurisdiction, possessing only such powers as are either expressly or by necessary implication conferred on them.

*Chicot County Drainage District v. Baxter St. Bank*,

308, U. S. 371, 66 S.Ct. 317, 84 L.Ed. 329;

*Bors v. Preston*, 111 U. S. 252, 28 L.Ed. 885;

*United States v. Johnson*, 123 Fed. (2d) 111;

*McQuillen v. National Cash Register Co.*, 112 Fed.

(2d) 877;

*in re Hollins*, 229 Fed. 349.

The criminal jurisdiction of the Federal courts is only such as is expressly conferred on them.

*Peters v. United States*, 94 Fed. 127.

A consent of the parties will not confer jurisdiction upon a Federal court where none exists.

*Iowa Lillooet Mining Co. v. Bliss*, 144 Fed. 446;

*Parkersburg First National Bank v. Prager*, 91 Fed.

689.

Thus the naked allegation that the action was a proceeding before the District Court for the District of Nevada, is an utterly insufficient statement of the jurisdiction, because it is a matter of judicial, and even common, knowledge, that many proceedings are brought in the Federal courts by litigants who have mistaken their forum.



For the utter lack of any proper averment of jurisdiction, of the court in which it is alleged that the party threatened was a witness, it is submitted that the information is void, and the conviction of appellant thereon a deprivation of due process of law.

For still another reason apparent upon the face of the record, the information in the instant case is void. It is verified by the oath of one W. G. Whitfield, who states that he is an investigator of the Alcohol Tax Unit of the Bureau of Internal Revenue, "that he has read the foregoing information, and that the facts therein stated are true of his own knowledge". (Tr. p. 3) The evidence produced at the trial shows that by no possibility could Whitfield have had any personal knowledge respecting the guilt or innocence of either of the defendants or of any other fact alleged in the information. No pretense is made that he was present at the time of the making of any of the alleged threats. His alleged knowledge of them was the veriest hearsay. The witness Haliman relates that the threats against him were made by the appellant in a bar-room in San Francisco; that the only persons within ear-shot at that time were the appellant, the witness and the witness' mother. On another occasion, the only persons present were the appellant, the witness Haliman, and the witness Bonita Yaggie. (Tr. pp. 20-23) It is of no avail that the affidavit filed in support of the information is couched in positive terms rather than on "information and belief". The requirements of the Constitution that no warrant shall issue except on probable cause, supported by oath or affirmation, cannot be circumvented by duplicity.

The instant case falls squarely within the rule of *United*

*States v. Collins*, supra, and *Johnston v. United States*, 87 Fed. 187.

In the latter case, the Circuit Court of Appeals of the 5th Circuit, says in part:

“The record shows that the plaintiff in error first demurred to the indictment on the ground that the information was not based upon an affidavit showing facts within the personal knowledge of the affiant.

“This demurrer being overruled, Johnston filed a plea in abatement, the grounds of which do not appear in the record. Following the plea in abatement, Johnston appears to have demurred generally to the information. The Bill of Exceptions found in the record purports to give all the testimony adduced on the trial of the case. The affidavit on which the information was based was wholly insufficient to warrant the arrest and trial of the plaintiff in error and is altogether too general in terms as to the offense against the United States said to have been committed; and it shows no knowledge, information, or even belief on the part of the affiant as to the guilt of the party charged, beyond the bare statement that ‘there is probable cause to believe that the said offense has been committed by P. T. Johnston’. However false the affidavit may be, it would be next to impossible to assign and prove perjury upon it.”

Holding that the demurrer should have been sustained, reversing the conviction, and remanding the cause with directions to the lower court to quash the information, the Circuit Court of Appeals cites two earlier cases:

*United States v. Tureaud*, 20 Fed. 621;

*United States v. Polite*, 35 Fed. 59.

In the last of these cases, it was held that "informations must be based on affidavits which show probable cause arising from facts *within the knowledge of the parties making them*, and that mere belief is not sufficient.

THE COURT ERRED IN ADMITTING IN EVIDENCE OVER THE OBJECTION OF SAID DEFENDANT THE TESTIMONY OF THE WITNESS DALE HALIMAN CONCERNING A CONVERSATION, TAKING PLACE ON APRIL 4, 1945, IN THE STREETS OF PARIS CAFE IN THE CITY AND COUNTY OF SAN FRANCISCO (Assignment No. II).

THE COURT ERRED IN ADMITTING IN EVIDENCE TESTIMONY AS TO CONVERSATIONS TAKING PLACE IN RENO, NEVADA, ON OR ABOUT THE 27TH DAY OF MARCH, 1945 (Assignment No. III).

THE COURT ERRED IN REFUSING TO STRIKE FROM THE RECORD ALL OF THE TESTIMONY OF THE WITNESS MRS. BONITA YAGGIE (Assignment No. IV).

THE COURT ERRED IN OVERRULING THE OBJECTION OF THE DEFENDANT TO TESTIMONY OF THE WITNESS MRS. MARIE V. COLE AS TO TESTIMONY CONCERNING THREATS MADE TO SAID WITNESS (Assignment No. V).

These assignments are considered together, because a like error was committed in each instance, to-wit: The admission in evidence of an alleged offense other than the one charged in the information. The law, with certain exceptions, of which this case is not one, prohibits the introduction in evidence in a criminal trial of other offenses than that alleged in the indictment or information. The rule and the exceptions thereto are exhaustively discussed in the classic case of

*People v. Molineux*, 168 N.Y. 264; 61 N.E. 286.

Very much in point is the brilliant opinion of Justice Henshaw, in *People v. Glass*, 158 Cal. 650, 112 Pac. 281.

In that case, the defendant, a public utility official, was convicted of offering a bribe to a member of the Board of Supervisors of the City and County of San Francisco to refuse to grant a franchise to a rival company. Upon the trial, a mass of evidence was introduced tending to show efforts made by the said company to prevent the same rival from acquiring a franchise in the City of Oakland. Reversing the conviction for the commission of this error, it is stated in the opinion:

“It should seem unnecessary to state—but apparently it is not—that a multitude of acts, facts, and happenings upon which men base their opinions and judgments of their fellowmen do not come within the definition and scope of *evidence* as known to our law. If a man is informed, and believes his informant, that another man is dissolute, is a gambler, is an associate of known thieves, is a petty larcenist, and makes his home in a house of prostitution, he will justly look upon such a person with suspicion, will properly govern his dealings and relations with that person by this information, and would most naturally say, if he learned that the man had been arrested for burglary, that ‘it was to be expected’. Yet, upon the trial of that man for burglary, no word of these matters would be admissible against him. Not because they would not have a tendency to show that a man of such character would be much more likely to commit the given offense than would a man of proven upright and honorable life, but because the law, for reasons good and sufficient unto itself, has declared that a man shall be put upon trial for but one offense, and that he shall not be embarrassed by being called upon to defend or exculpate himself, or to explain any damaging act or fact which is not embraced within the



charge he is called upon to meet. The law will not even permit a defendant's reputation to be assailed unless he shall himself have made that reputation an issue in the case. This, perhaps undue, tenderness goes to the extent that his guilt of petty offenses may not even be shown, and in his impeachment it may be established against him only that he has been previously convicted of a felony. It would, no doubt, have made most potently against this defendant in the minds of the jurors, if, for example, it could have been shown that in this separate and distinct Oakland transaction he had bribed the councilmen there. But no one has been bold enough to assert that such evidence would be admissible, and the decisions of every court, including our own, are against its admissibility. Not only is the prosecution thus forbidden to prove another crime, but the law does not sanction the introduction of evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury."

Other often-quoted decisions stating that the general rule is against receiving evidence of another offense are, among many:

*Coleman v. People*, 55 N.Y. 81;

*People v. Sharp*, 107 N.Y. 427; 14 N.E. 319;

*People v. Shea*, 147 N.Y. 78; 41 N.E. 505;

*Commonwealth v. Jackson*, 132 Mass. 16;

*Shaffner v. Commonwealth*, 72 Pa. 60;

*People v. Lane*, 100 Cal. 379;

*People v. Cook*, 148 Cal. 334;

*Boyd v. U.S.*, 142 U.S. 450; 12 S.Ct. 292; 35 L.Ed. 1077;

*Fish v. U.S.*, 215 Fed. 544.



**CONCLUSION**

For the errors above assigned, it is submitted that the judgment should be reversed and the cause remanded to the District Court with directions to quash the information and to discharge the appellant without day.

Dated: San Francisco, California, February 20, 1946.

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